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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 49

[illegible] and SOUTH FLORIDA FLOWERS ASSOCIATION, INC., Florida corporation,

Appellants,

vs.

[illegible] Director of the Department of Agriculture of the State of California,

Appellee.

Appeal from the United States District Court for the Northern District of California, Northern Division

APPELLEE'S BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 49

FLORIDA LIME AND AVOCADO GROWERS, INC., a Florida corporation, and SOUTH FLORIDA GROWERS ASSOCIATION, INC., a Florida corporation

Appellants,

vs.

W. C. JACOBSEN, Director of the Department of Agriculture of the State of California,

Appellee.

Appeal from the United States District Court for the Northern District of California, Northern Division

APPELLEE'S BRIEF

OPINION BELOW

The opinion of the three-judge district court dismissing the case for lack of jurisdiction is reported at 169 F. Supp. 774.

JURISDICTION

Appellee has heretofore moved that the appeal be dismissed because it is not within the jurisdiction of this Court, and alternatively, that the judgment below should be affirmed because the questions presented are so unsubstantial as not to need further argument. By order of June 22, 1959, the Court postponed consideration of jurisdiction to the hearing of the case on the merits. 359 U. S. 915.

QUESTIONS PRESENTED

Whether this Court has jurisdiction of the case under 28 U. S. C. Sec. 1253.

Whether there exists a case or controversy under Article III, United States Constitution, cognizable in the United States District Court.

STATUTES INVOLVED

The pertinent provisions of the California statutes (Calif. Agr. Code, Secs. 784, 785, 785.6, 792, 831) and of the California regulations (3 Calif. Adm. C., Secs. 1366.2 and 1397.6) are set forth in Appendix A to Appellee's Brief.

STATEMENT

Appellants' complaint in the district court asks that the California avocado maturity statute be declared invalid under the Federal Constitution and under controlling federal law, and that California officers be restrained from enforcing the state statute. Appellants are Florida corporations engaged in the business

marketing avocados and other agricultural products grown in Florida (R. 4, 219, 281). California Agricultural Code Section 792, the statute under attack by appellants, is part of a comprehensive statutory scheme regulating the quality and maturity of agricultural products sold to California consumers. See California Agricultural Code Sections 751-1149.9. Section 792 provides in relevant part:

> "All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 percent of oil, by weight of the avocado excluding the skin and seed."

The 8 percent oil content requirement of Section 792 was first adopted by the California Legislature as a measure of avocado maturity in 1925. Section 10, Chapter 350, California Statutes of 1925. The 8 percent oil test for determining avocado maturity has been a part of the California Agricultural Code ever since.

Both appellants began marketing avocados grown in Florida in 1939 (R. 219, 281). They began shipping Florida avocados to California markets in 1954 (R. 226, 289). The complaint initiating the present litigation was filed in the United States District Court for the Northern District of California on November 13, 1957 (R. 4). In their complaint appellants contend that as applied to Florida avocados marketed in California, the 8 percent oil maturity law is unconstitutional under the Commerce Clause and the Equal Protection Clause of the Constitution (R. 5). Appellants' complaint also contains that this oil standard is invalid as being in

conflict with the Agricultural Marketing Agreement Act of 1937, 49 Stat. 750, as amended 50 Stat. 246; 7 U. S. C. Secs. 601-659, and as implemented by an administrative marketing order issued by the Secretary of Agriculture regulating avocados grown in South Florida (R. 6; 7 CFR Part 1, 969). Appellants prayed for both interlocutory and permanent injunction over against appellees, but neither appellant has taken any steps toward applying for interlocutory relief (R. 1-16).

After appellees answered the complaint, appellants by written stipulation were given permission to take depositions of their own witnesses in Florida. [Original Certified Record, 190].[1] The stipulation signed by counsel for appellants stated "that plaintiffs [appellants] represent that said depositions are not being taken for purposes of discovery but are to be offered in evidence by the plaintiffs [appellants] and are being taken for plaintiffs' sole benefit and are not sought by the defendants [appellees] hereto" [Original Record, 190]. Two of the depositions contained in the printed record on appeal are those of Harold E. Kendall, President of appellant South Florida Growers Association, Inc., and Fred A. Piowaty, Assistant General Manager of appellant Florida Lime and Avocado Growers, Inc. (R. 218-280; 281-298).

[1] Counsel for appellants and appellee have filed a stipulation dated July 13, 1959, agreeing that reference may be had to the oral argument to the unprinted portions of the record on file with the clerk.

The allegations of appellants' complaint and the evidence presented by their principal officers, Kendall and Piowaty, reflect the following pattern of business: Between them appellants market approximately 50 percent of all avocados grown in Florida (R. 9). Avocados are but one of a number of Florida agricultural products marketed by appellants (R. 219, 281).

Since 1954, when appellants first began marketing avocados in California, approximately 96.35 percent of all avocados shipped by appellants to California passed the 8 percent oil test of maturity and were freely marketed in California (Pl. Ex. 17, R. 436, 230; Pl. Ex. 19, R. 438, 247-248; Pl. Ex. 20, R. 438, 283; Pl. Ex. 21, R. 439, 286; D. Ex. S, R. 445, 296).[2] Appellant Florida Lime and Avocado Growers, Inc., claims that during the marketing seasons for the years 1954 to 1957, 6,681 lug boxes of its avocados—representing only 5.47 percent of the total shipped to California during the period—failed to comply with the avocado maturity law (Pl. Ex. 20, R. 438, 283; Pl. Ex. 21, R. 439, 286). Appellant South Florida Growers Association, Inc., asserts that during the 1954 to 1957 marketing seasons 941 bushels, representing only 1.84 percent of the avocados it shipped to California during that period, were determined by California authorities to be in noncompliance with the 8 percent oil law (Pl. Ex. 17, R. 436, 230; Pl. Ex. 19, R. 438, 247-248).

Appellant Florida Lime and Avocado Growers, Inc., during the years 1954, 1955, 1956 and 1957, made total

[2] All exhibits marked for identification only, e.g., R. 116.

national shipments of 123,833 bushels of avocados, of which the shipments to California amounted to 16,7[illegible] bushels or 13.53 percent of the national total (Pl. Ex. 20, R. 438, 283). The quantity which this appellant claims failed to comply with the California oil maturity standard during these years amounted to 1,8[illegible] bushels, representing .74 percent of this appellant's total avocado sales (Pl. Ex. 20, R. 438, 283; Pl. Ex. 21, R. 439, 286). Shipments to California during this period represented only 5 percent of appellant Southern Florida Growers Association's total national sales, and the 642 bushels which failed to meet the California maturity standard represented .09 percent of this appellant's total national avocado sales for these years (Pl. Ex. 17, R. 436, 230; Pl. Ex. 19, R. 438, 247-248).

The pattern of business operations followed by both appellants, upon receiving notice from California authorities that a shipment of avocados did not comply with the avocado maturity law, has been as follows. Both followed the practice of voluntarily transshipping these lots for sale in other western markets outside California (Pl. Ex. 17, R. 436, 230; Pl. Ex. 21, 439, 286; 234). The financial loss which appellants claim resulted from the operation of the California statute was a reduction in anticipated returns from sales of noncomplying fruit on other western markets (R. 249-251, 292-293). Appellant Florida Lime and Avocado Growers, Inc., for example, claims a reduction from gross returns of $7,196.01 during the fis-

year April 1, 1955 to March 31, 1956 by reason of marketing noncomplying fruit outside California (Pl. Ex. 21, R. 439-440, 286). This represents a reduction of 1.23 percent of this appellant's gross receipts from all business for this fiscal year (R. 87). Appellant South Florida Growers Association, Inc., claims a reduction in gross income on noncomplying fruit transshipped to other western markets as follows: 1954—$554.33, representing .037 percent of this appellant's total gross income; 1955—$210.62, representing .012 percent of total gross income; and 1956—$821.62, representing .047 percent of total gross income (Pl. Ex. 17, R. 436, 230; R. 85).

Accepting as true the allegations of appellants' complaint and the evidence presented by their corporate officers,[3] appellee filed motions to dismiss the action as to both appellants (R. 44, 78). Appellee urged in support of his motions to dismiss that appellants' case was not within the equity jurisdiction of the district court because of failure to meet the "strict test" (*American Federation of Labor* v. *Watson*, 327 U. S. 582, 593) of great and immediate irreparable harm which a litigant must satisfy before a federal court will exercise its

[3] Appellants complained in their Jurisdictional Statement that to the extent that the decision of the district court is of a factual nature, it is somehow incorrect. Jurisdictional Statement, p. 7. However, a motion to dismiss, like a motion for summary judgment under Rule 56, Federal Rules of Civil Procedure, may be based on pleadings, depositions and affidavits if there is no genuine issue as to material facts controlling the questions raised by the motion to dismiss. See, *e.g.*, *Spielman Motor Company* v. *Dodge*, 295 U. S. 89, 91-92; *Ex parte La Prade*, 289 U. S. 444, 452. Significantly, appellants cite no specific factual basis of the decision below which they claim to be erroneous.

powers of equity to interfere with the enforcement of state laws (R. 78, 44 et seq.). See, *e.g.*, *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 95; *Douglas* v. *Jeannette*, 319 U. S. 157, 164. Other grounds for appellants' motions to dismiss were that the complaint fails to show that the matter in controversy exceeds the sum or value of $3,000 within the purview of 28 U. S. C. Sec. 133, and that the complaint fails to show that the action or proceeding arises under any act of Congress regulating commerce within the purview of 28 U. S. C. Sec. 1337 (R. 44-45, 78-79). Alternatively, appellees moved the court to hold the case in abeyance pending an authoritative interpretation of California law by California courts (R. 45, 79). See *e.g.*, *American Federation of Labor* v. *Watson*, 327 U. S. 582; *Meridian* v. *Southern Bell Tel. & Tel. Co.*, 358 U. S. 639; *Martin* v. *Cross*, 360 U. S. 219.

The district court dismissed the complaint on the ground that it had no jurisdiction because of the absence of a presently existing controversy between the parties. *Florida Lime & Avocado Growers* v. *Jacobsen*, 169 F. Supp. 774. The court's conclusion is summed up as follows:

> "There is no claim here of any present existing controversy between the parties. The claim at best suggests no more than a threatened controversy. An actual controversy could arise only if there were a co-existence of four facts, namely:
>
> "1. The bringing of avocados to California by plaintiff;

"2. The failure of avocados to meet the standards fixed by law;

"3. The refusal of the plaintiff to recondition or remove the avocados; and

"4. An election by plaintiffs to contest the abatement in the state courts as provided by Section 785 [of the California Agricultural Code]. 169 F. Supp. at 776."

No request for leave to amend the complaint was made, nor did appellants seek rehearing, following dismissal of the case (R. 1-3). On February 12, 1959, appellants filed a direct appeal from the judgment of dismissal entered January 13, 1959, by a single district court judge (R. 104).[4]

[4] The complaint names as defendants the Governor, Attorney General and the Director of Agriculture of the State of California (R. 4). The action abated as to the defendants Governor and Attorney General, who vacated their respective state offices on January 5, 1959, the District Court by order of February 20, 1959, having refused to join their successors in office as defendants (R. 109). *United States* v. *Boutwell*, 17 Wall. 604.

SUMMARY OF ARGUMENT

I. Appellants' Case is Not Within the Jurisdiction of the Court.

Direct appeal to this court cannot be taken under 28 U. S. C. Sec. 1253 unless the action is one required to be heard and determined by a district court of three judges. *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368. 28 U. S. C. 2281 provides that only a district court of three judges may grant an injunction restraining the enforcement of a state statute "upon the ground of the unconstitutionality of such statute." This section does not govern all suits in which the object is to restrain the enforcement of state legislative action, but only those cases coming within its terms. *Ex parte Collins*, 277 U. S. 565, 568-569.

California Agricultural Code Section 792 establishes maturity and quality standards for avocados and provides in relevant part: "All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 percent of oil, * * *." Appellants are Florida corporations handling avocados grown in Florida, and attack the state statute on the grounds that it violates the Equal Protection Clause and the Commerce Clause of the United States Constitution (R. 4, 219, 281). Appellants combine these two constitutional arguments with an assertion that the California statute conflicts with the Agricultural Marketing Agreement Act of 1937, 49 Stat. 750, as amended 50 Stat. 246; 7 U. S. C. Secs. 601-659 (R. 4). An assertion that a state statute is invalid because it conflicts

with a controlling federal statute is not a ground of unconstitutionality of the statute within the meaning of 28 U. S. C. Sec. 2281. *Ex parte Buder*, 271 U. S. 461.

Where the only ground for seeking injunctive relief is that the state statute conflicts with the federal statute, a three-judge court is not required and a direct appeal will not lie to the Supreme Court. *Ex parte Buder*, 271 U. S. 461. Conversely, when the jurisdiction of the district court rests solely upon an attack upon a state statute because of its alleged violation of the Federal Constitution, a direct appeal to the Supreme Court is the only method of review. *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 52. Where, as in the instant case, a ground of unconstitutionality is joined with the ground that the state statute conflicts with a controlling federal statute, the injection of the nonconstitutional ground should render inapplicable the three-judge requirement of 28 U. S. C. 2281. To interpret Section 2281 otherwise would produce an anomalous result. If the plaintiff joins a nonconstitutional ground to the complaint, it is likely that the case will be decided on that ground if at all possible. The avoidance of constitutional questions where possible is a rule that is basic in the federal judicial system. *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 570. Thus to permit a three-judge court to be convened for the purpose of deciding a nonconstitutional question would extend, rather than limit,

the scope of Section 2281, a statute heretofore ... scribed by the Court "as an enactment technical in ... strict sense of the term and to be applied as such." *Phillips v. U. S.*, 312 U. S. 246, 250-251. Though ... roneously convened, the judgment of the three-judge district court is valid and appellants' appeal must ... taken to the appropriate court of appeals, with review thereafter in proper cases to this Court. *Stainback v. Mo Hock Ke Lok Po*, 336 U. S. 368.

II. Appellants' Case Fails to Show the Existence of a Case or Controversy.

Since 1954, when appellants first began marketing Florida avocados in California, approximately 96 percent of all avocados shipped by appellants to California passed the 8 percent maturity oil test, and were sold in California (Pl. Ex. 17, R. 436, 230; Pl. Ex. 19, R. 438, 247-248; Pl. Ex. 20, R. 438, 283; Pl. Ex. 21, R. 439, 286). Those lugs of avocados which failed upon inspection to comply with state law were voluntarily transshipped by appellants for sale in neighboring western markets (Pl. Ex. 17, R. 436, 230; Pl. Ex. 21, R. 439, 286). None of appellants' avocados were seized by California authorities (Pl. Ex. 22, R. 441, 287), nor did appellants at any time violate California law. Appellants make no claim of personal wrongdoing against appellee regarding past shipments to California, and these transactions are closed. While appellants desire in the future to market low oil content avocados which

may not comply with California statute, they have never actually done so. No threatened interference with appellants' rights appear beyond that implied by the existence of the California statute. A general threat that public officers will enforce the laws they are charged to administer is not sufficient to create a justiciable controversy, *United Public Workers* v. *Mitchell*, 330 U. S. 75, 88. Appellants' grievance with the statute does not create a case or controversy since, in the absence of a personal wrong, a state officer may not be sued in a representative capacity in order to test the constitutionality of a state statute. *Fitts* v. *McGhee*, 172 U. S. 516, 530; *Ex parte Young*, 209 U. S. 123, 157.

Realistically, appellants are seeking to establish a defense against state action which they fear that appellee may in the future assert against them in the state courts. Appellants must await such court action, or other interference by appellee with their marketing of avocados in California, before a justiciable controversy based on concrete facts will appear. *Public Service Comm'n* v. *Wycoff*, 344 U. S. 237, 248. The fact that the appellants' desires are thwarted by their own doubts does not confer a cause of action. *Willing* v. *Chicago Auditorium*, 279 U. S. 274, 289-290. These considerations compel the conclusion that appellants' case, by reason of its uncertainty, fails to show the existence of a controversy with appellee under Constitution, Article III.

III. Appellants' Case is Not Within the Equity Jurisdiction of the District Court.

Appellants are not sufficiently affected by the California avocado maturity law to warrant the interference by the injunctive powers of a federal court of equity. Over 96 percent of the avocados shipped by appellants to California complied with the statute and were freely marketed in California (Pl. Ex. 17, R. 436, 230; Pl. Ex. 19, R. 438, 247-248; Pl. Ex. 20, R. 438, 283; Pl. Ex. 21, R. 439, 286). The few shipments that failed to comply with the California maturity standards were not lost to appellants but were transshipped for sale in adjoining western markets. The claimed reduction in gross return caused by such transshipments for the fiscal year April 1, 1955, to March 31, 1956, by appellant Florida Lime and Avocado Growers, Inc., amounted to $7,496.01, a reduction of only 1.23 percent of the appellants' gross receipts from all business (Pl. Ex. 21, R. 439-440, 286; R. 87). Similarly, appellant South Florida Growers Association, Inc., claims reductions in total gross income from these transshipments of .03 percent for 1954, .12 percent for 1955, and .047 percent for 1956 (Pl. Ex. 17, R. 436, 230; R. 85). None of appellants' avocado shipments have been seized by California authorities (Pl. Ex. 22, R. 441, 287) nor have appellants committed a violation of the California Fruit and Vegetable Standardization Law, California Agricultural Code, Sections 751 et seq. These circumstances show that appellants have not sustained, nor are they threatened with,

"irreparable injury" both "great and immediate" which would prompt the federal chancellor to interfere by injunction with the enforcement of the California avocado maturity statute. *Spielman Motor Co. v. Dodge*, 295 U. S. 89, 95; *American Federation of Labor v. Watson*, 327 U. S. 582, 593.

ARGUMENT

I. The Appeal Must be Dismissed Because the Case is Not Within the Jurisdiction of This Court.

Direct appeal to this court cannot be taken under 28 U. S. C. Sec. 1253 unless the action is one required to be heard and determined by a district court of three judges. *Stainback v. Mo Hock Ke Lok Po*, 336 U. S. 368; *Phillips v. United States*, 312 U. S. 246; *Oklahoma Gas & E. Co. v. Oklahoma Packing Co.*, 292 U. S. 386; *Gully v. Interstate Natural Gas Co.*, 292 U. S. 16. The threshold jurisdictional question is, therefore, whether appellants' case is one that is required by 28 U. S. C. Sec. 2281 to be heard by a three-judge court.

Section 2281 provides that only a district court of three judges may grant an injunction restraining the enforcement of a state statute "upon the ground of the unconstitutionality of such statute." The section does not govern all suits in which the object is to restrain the enforcement of a state legislative action. *Ex parte Collins*, 277 U. S. 565, 568-569.

Appellants attack the validity of Section 792 of the California Agricultural Code on the grounds that it

violates the Equal Protection Clause and the Commerce Clause of the United States Constitution (R. 4). Appellants combine these two constitutional arguments with an assertion that the California statute conflicts with a federal statute, the Agricultural Marketing Agreement Act of 1937, 49 Stat. 750, as amended 50 Stat. 246; 7 U. S. C. Sec. 601-659 [R. 4]. An assertion that a state statute is invalid because it conflicts with a controlling federal statute is not a ground of unconstitutionality of the statute within the meaning of 28 U. S. C. Sec. 2281. *Lemke* v. *Farmers' Grain Co.*, 258 U. S. 50; *Ex parte Buder*, 271 U. S. 461.

The issue, then, is one of statutory construction: Is a three-judge court required under Section 2281 if a nonconstitutional federal ground of attack on the validity of the statute is joined with a ground of its unconstitutionality?

There is authority that where the jurisdiction of the district court rests solely upon an attack upon a state statute because of its alleged violation of the Federal Constitution, a direct appeal to the Supreme Court is the only method of review. *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, 52. Conversely, there is authority that if the only ground for seeking injunctive relief is that the state statute conflicts with a controlling federal statute, a three-judge court is not required, and a direct appeal will not lie to the Supreme Court. *Ex parte Buder*, 271 U. S. 461, and where, as in the instant case, a ground of unconstitutionality is joined

ith the ground that the state statute conflicts with federal statute, the injection of the nonconstitutional ground should render inapplicable the three-udge requirement of 28 U. S. C. 2281. If the three-udge court was improperly convened, the appeal lies to the appropriate court of appeals. *Phillips* v. *United tates*, 312 U. S. 246.

Denying a plaintiff the right to the extraordinary rocedure of a three-judge district court, if he attacks state statute on a ground other than its unconstitutionality, is consistent with the policy of close conruction which the Court has historically applied hen interpreting the scope of the three-judge requirement of 28 U. S. C. Sec. 2281 and its predecessor tatutes. See *Phillips* v. *United States*, 312 U. S. 246, 51.

The three-judge requirement of 28 U. S. C. 2281 derives from Section 17 of the act of June 18, 1910, 36 tat. 539, 557. At the time of its enactment the federal courts, except as restrained against enjoining roceedings in state courts by the act of March 2, 793, 1 Stat. 333, 334-5, had statutory authority to rant restraining orders against state officers without otice, (Act of June 1, 1872, 17 Stat. 196, 197), and to nter such interlocutory and final injunctions after otice and hearing. Act of March 2, 1793, 1 Stat. 333, 34; Act of June 1, 1872, 17 Stat. 196, 197; Equity ule 33; *Industrial Min. Guaranty Co.* v. *Electrical ecurity Co.*, 58 Fed. 732, 737 (1893). No provision was

made for expediting the hearing on a motion for injunction where a restraining order had been issued, nor was any time limitation put to the operation of the restraining order, except for the ruling of the court on motion.

In this procedural context, the Court in *Ex parte Young*, 209 U. S. 123 (1908), reaffirmed the jurisdiction of the federal courts to entertain suits to restrain the wrongful acts of state officers acting under color of state law, where the plaintiff asserted rights protected by the Constitution. In an era of increasing state regulation of commerce the *Young* decision raised a congressional concern that the solemn legislative acts of the states, and the efforts of state officers to enforce them, were being impeded by the abusive use of federal court ex parte restraining orders and interlocutory injunctions. 42 Cong. Rec. 4846 et seq. (1908); 45 Cong. Rec. 7252 et seq. (1910); Hutcheson, A Case for Three Judges, 47 Harv. L. Rev. 795, 803. The mischief as conceived by Congress lay not in the exercise of the federal jurisdiction in such cases, but in the manner of its exercise. The ameliatory legislation (Section 17 of the act of June 18, 1910, 36 Stat. 539, 557) established new procedural safeguards by requiring that a three-judge court pass on applications for interlocutory injunctions in such cases. This device of a court of special dignity, with expedited review in the Supreme Court, was taken from the act of February 11, 1903, 32 Stat. 823, which established such a

court for antitrust cases certified by the Attorney General to be of general public importance, and from the act of June 29, 1906, 34 Stat. 584, 592, which directed that a three-judge court hear any suit to restrain, set aside, or annul an order of the Interstate Commerce Commission.

To avoid the anomaly of a single judge reviewing the interlocutory decision of a three-judge court, the act of February 13, 1925, 43 Stat. 936, 938, extended the requirement of three judges to the hearing on final injunction. *Smith* v. *Wilson*, 273 U. S. 388, 390. Thereafter Congress recognized the common practice of having the case heard in the District Court on interlocutory and final injunction at the same time, (*e.g.*, *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89), and by the act of June 25, 1948, 62 Stat. 869, 968, made the three-judge requirement applicable to hearings for either interlocutory or permanent injunction.

However, the right of direct appeal to the Supreme Court from three-judge court interlocutory decrees added new obligatory jurisdiction to an already overburdened court. At the suggestion of the Court, Congress by the Judiciary Act of 1925, 43 Stat. 936, transferred numerous classes of cases from obligatory review by appeal or writ of error to discretionary review by certiorari. Direct review by the Supreme Court was abolished from decisions of the district court, except in suits arising under the Federal Antitrust, Interstate Commerce, and Stockyard and Packer Acts, writs of error by the United States in

criminal cases, suits to enjoin orders of the Interstate Commerce Commission, and in suits to enjoin the enforcement of state statutes under Judicial Code Section 266.[5] The earlier 1911 Judicial Code Section 266, 36 Stat. 1087, 1162, authorized a direct appeal to the Supreme Court from a three-judge district court interlocutory order granting or denying an injunction restraining the enforcement of a state statute claimed to be unconstitutional. The right of direct appeal from a one-judge district court final judgment or decree was much broader under 1911 Judicial Code Section 238 [36 Stat. 1087, 1157], since the only requirement was that the case be one "in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States." See *Shaffer* v. *Carter*, 252 U. S. 37. This broad right of direct appeal was eliminated by the Judiciary Act of 1925, 43 Stat. 936, 938, which limited direct appeals to the orders of three-judge district courts granting or denying interlocutory injunctions restraining enforcement of a state statute on the ground of its unconstitutionality, and from a three-judge district court order granting or denying a permanent injunction in such suits where application for the interlocutory injunction had been made. *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317, 319-321; 66 Cong. Rec. 2917 (1925).

The Court early applied the policy of narrowing its obligatory jurisdiction as expressed in the Judiciary Act of 1925, 43 Stats. 936, when interpreting the

[5] Frankfurter & Landis, Judiciary Act of 1925, 42 Harvard Law Review 1; Judiciary Act of 1925, 43 Stat. 936, 938.

scope of the statute requiring three-judge courts to hear suits to enjoin enforcement of state statutes. *See Ex parte Buder*, 271 U. S. 461 (1926); *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317 (1926); *Smith* v. *Wilson*, 273 U. S. 388, *Ex parte Collins*, 277 U. S. 565. In addition to insuring tighter control over its own docket, this restrictive interpretation of the three-judge statute permitted the Court to receive more benefit from the illumination which serious questions derive from passing through the courts of appeals.

Congress, mindful that a severe burden was placed upon the federal judiciary by the requirement of a panel of three judges, combined with a right of direct appeal to the Supreme Court, confined this unusual procedure to "a limited class of cases of special importance and requiring special treatment in the interest of the public." *Ex parte Collins*, 277 U. S. 565, 568-569.

Mr. Justice Frankfurter, speaking for a unanimous Court, expressed the philosophy of the statute in *Phillips* v. *U. S.*, 312 U. S. 246, 250-251:

". . . The history of [Judicial Code] § 266 . . ., the narrowness of its original scope, the piece-meal explicit amendments which were made to it . . ., the close construction given the section in obedience to Congressional policy [cases cited], combine to reveal § 266 not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such.

"To bring this procedural device into play to dislocate the normal operations of the system of

> lower federal courts and thereafter to come directly to this Court—requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission.' The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy. This was the aim of Congress and this is the reconciling principle of the cases."

If a plaintiff who wishes to challenge a state statute on a nonconstitutional ground is permitted to invoke the extraordinary three-judge procedure by joining a ground of unconstitutionality, an anomalous result may obtain which would be out of harmony with the policy of close construction of Section 2281. If the plaintiff injects a nonconstitutional ground into the complaint, it is likely that the case will be decided on that ground if at all possible. The avoidance of constitutional questions where possible is a rule that is basic in the federal judicial system. *Rescue Army* v. *Municipal Court*, 331 U. S. 549, 570; *Siler* v. *Louisville & N. R. Co.*, 213 U. S. 175, 193. Thus to permit a three-judge court to be convened for the purpose of deciding a nonconstitutional question would extend rather than limit the scope of Section 2281.

If the suit is not one required to be heard by a three-judge court under 28 U. S. C. Sec. 2281, a direct appeal to this Court may not be taken under 28 U. S. C.

Sec. 1253. *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368; *Phillips* v. *United States*, 312 U. S. 246. Where a three-judge court is erroneously convened, the appeal from its final judgment must be taken to the appropriate court of appeals. *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368 at 380, 381; *Phillips* v. *United States*, 312 U. S. 246 at 254.

Appellants have not taken an appeal to the Court of Appeals for the Ninth Circuit. Since there is no case pending in the Court of Appeals, the appeal may not be considered as a petition for certiorari, as was done in *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368. There is no statutory authority for review of a district Court case by writ of certiorari. Since the case is not one for which a court of three judges is prescribed under 28 U. S. C. Sec. 2281, no appeal lies to this court and it is without jurisdiction to hear the merits of the appeal. *Smith* v. *Wilson*, 273 U. S. 388.[6]

[6] In *Parker* v. *Brown*, 317 U. S. 341 (1943), the Court accepted a direct appeal from a district court in a case which joined an attack on a state regulation on the ground of its unconstitutionality under the Commerce Clause, with a charge that the regulation was in conflict with a federal statute. However, the briefs filed in the case show that the parties assumed, without argument, the appellate jurisdiction of the Court. See records in *Parker* v. *Brown*, No. 46, October Term 1942; 10 L. W. 3347. The opinion of the Court on this point merely recites "The case was tried by a district court of three judges and comes here on appeal under Sections 266 and 238 of the Judicial Code as amended, 28 U. S. C. Sections 380, 345 (now 28 U. S. C. 2281 and 1252 and 1253)." *Parker* v. *Brown*, 317 U. S. 341, 344-345. As said by Mr. Justice Sutherland in *Webster* v. *Fall*, 266 U. S. 507, 511: "The most that can be said is that the point was in the cases if anyone had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the Court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." Even more pertinent is the

II. Appellants' Case Fails to Show the Existence of a Case or Controversy.

There is no justiciable "controversy" under Article III of the Constitution unless the controversy between the parties is definite and concrete. "It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227, 240-241. The judicial power does not extend to the determination of abstract questions. *Ashwander v. Valley Authority*, 297 U. S. 288, 324. Claims based upon potential invasions of rights are not enough to warrant judicial intervention. *Arizona v. California*, 283 U. S. 423, 462.

It is also fundamental that an action in the federal courts against a state official charged with enforcing a statute is barred by the Eleventh Amendment unless brought against him in his individual capacity, and must be based upon an allegation of a wrong that he has individually done. *Fitts v. McGhee*, 172 U. S. 516, 529-530. As stated by Mr. Justice Peckham in *Ex parte Young*, 209 U. S. 123, 159-160, with regard to the immunity from suit of a state officer attempting to enforce an unconstitutional statute: "* * * the officer in proceeding under such enactment comes into

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statement by Chief Justice Marshall: "No question was made in that case, as to the jurisdiction. It passed sub silentio, and the Court does not consider itself as bound by that case." *United States v. More*, 3 Cranch 159 at 172, quoted in *New York v. Oklahoma*, 195 U. S. 252 at 256.

conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct."

The case then presents this picture: Appellants desire in the future to market avocados in California which may not comply with California law. They have never actually done so (Pl. Ex. 17, R. 436, 230; Pl. Ex. 21, R. 439, 286). In the past appellants freely sold a very high percentage of their avocados transported to California markets (supra at 5). The few lots which did not meet the California standard were voluntarily transshipped and sold in neighboring western markets (Pl. Ex. 17, R. 436, 230; Pl. Ex. 21, R. 439, 286). These circumstances show that appellants' real grievance is with the state statute, not personally against the appellee state officer. Appellants make no claim of personal wrongdoing against appellee regarding the past shipments to California, and these transactions are closed. Neither do appellants allege a controversy over any current shipments. There being no existing controversy with any state officer, the case must fail. For in the absence of a personal wrong, a state officer may not be sued in a representative capacity in order to test the constitutionality of a state statute. This device " * * * would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with

the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons." *Fitts* v. *McGhee*, 172 U. S. 516, 530; *Ex parte Young*, 209 U. S. 123, 157.

Appellants' complaint alleges that "some of the highest grade Florida avocados, when fully mature, have oil content of less than 6 percent and as low as 2 percent . . .", and that ". . . most Florida avocados, at the time of picking permitted by the applicable laws and regulations of the United States . . . have oil content of less than the 8 percent made prerequisite to sale in California . . ." [R. 12-13].[7] No claim is made that any of the alleged low oil content varieties of avocados have been shipped to California, and over 95 percent of the varieties actually shipped were found upon inspection to comply with the state law (Pl. Ex. 17, R. 436, 230; Pl. Ex. 19, R. 438, 247-248; Pl. Ex. 20, R. 438, 283; D. Ex. S., R. 445-447, 296). Thus, appellants' fears relate to the hypothetical action which appellee may take if and when appellants ship their allegedly low oil content varieties of avocados to California. As Mr. Justice McKenna stated in *Lehon* v. *Atlanta*, 242 U. S. 53, 56: "To complain of a ruling one must be made the victim of it. One cannot invoke to defeat a law an apprehension of what might be done under it and, which if done, might not receive judicial approval."

Appellants' case is too contingent and speculative to meet the test of justiciability. Appellants are in much

[7] Appellee's answer denies these allegations (R. 27).

the same position as the federal employees in *United Public Workers* v. *Mitchell*, 330 U. S. 75, who sued to enjoin the Civil Service Commission from enforcing the Hatch Act and for a declaratory judgment holding the act unconstitutional. The federal employees involved, except one Pool, declared their desire to engage in political activity proscribed by the act, but had not actually done so. The court held that no case or controversy existed because the absence of actual violations rendered the threat of dismissal or discipline to be hypothetical, not actual.

Similarly, appellant corporations merely declare their desire to market avocados in California which may not comply with California law. They have not actually done so. They have in the past successfully sold a very high percentage of their avocados in California markets and have reshipped the few lots that did not meet the California standard to neighboring western markets. No threatened interference with appellants' rights appears beyond that implied by the existence of the statute. A general threat that officers will enforce the laws they are charged to administer is not sufficient to create a justiciable controversy. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 88.

Appellants' case is distinguishable from *Evers* v. *Dwyer*, 358 U. S. 202, relied on by appellants. The plaintiff in *Evers* v. *Dwyer*, a Negro, immediately violated the Memphis segregation ordinance at the moment he seated himself in the front portion of the public bus. At this point the justiciable controversy

came into existence. The facts which would form the basis of the litigation were fixed and would never be more concrete. Regardless of how many times the plaintiff boarded a Memphis bus, his racial identity under the ordinance would be unchanged.

Appellant corporations, on the other hand, have not violated the California law. Moreover, there are no concrete facts to shape a justiciable dispute because appellants have reshipped to other markets the few lots of avocados which have failed to meet the 8 percent oil standard. Appellants seek to enjoin the enforcement of the California statute as to future shipments. But it is a matter of speculation whether the avocados in such future shipments will have insufficient oil content under the statute. Certainly appellants' past experience indicates a high probability that future shipments will be marketed freely in California (supra at 5). Only if appellants refuse to either transship or to recondition a specific lot which fails to meet the statutory standard, thereby giving rise to a specific dispute with the state or county agricultural inspectors, will the facts be as concrete as in *Evers* v. *Dwyer*, 358 U. S. 202.

Realistically, appellants are seeking to establish a defense against state action which they fear that appellee may in the future assert against them in the California courts. *Cf. Public Service Comm'n* v. *Wycoff*, 344 U. S. 237, 248; *Pub. Util. Comm'n* v. *United Air Lines*, 346 U. S. 402. In the posture of their case, appellants' argument is with the state stat-

ute, not with the appellee. It is not the action of the appellee, but the appellants' fears, which hinder their marketing of avocados in California. "The fact that the plaintiff's desires are thwarted by its own doubts, or by the fears of others, does not confer a cause of action." *Willing* v. *Chicago Auditorium*, 277 U. S. 274, 289-290.

Should a California county agricultural commissioner or a state inspector interfere in the future with one of appellants' shipments to California, an actual controversy involving a fixed factual situation will exist, and appellants will have available to them ample legal remedies in the state courts to test the validity of the statute. The court would have before it a concrete set of facts which would limit the scope of the legal determination, would aid in the formulation of the precise constitutional issue to be decided, and would add to its weight as precedent. These considerations compel the conclusion that appellants' case, by reason of its uncertainty, fails to show the existence of a controversy with appellee under Constitution, Article III.

III. Appellants' Case is Not Within the Equity Jurisdiction of the District Court.

The principal ground for appellee's motion to dismiss below was that appellants did not meet the "strict test" (*American Federation of Labor* v. *Watson*, 327 U. S. 582, 593) of great and immediate irreparable harm which a litigant must satisfy before a federal court will exercise its powers of equity to

interfere with the enforcement of state laws. *E.g.*, *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 95; *Douglas* v. *Jeannette*, 319 U. S. 157, 164.

This ground for dismissing the action assumes the existence of a justiciable controversy which the district court has authority to hear and decide. It raises the further question whether the district court should exercise its equitable powers, which of course are discretionary in nature. *American Federation of Labor* v. *Watson*, 327 U. S. 582, 593; *Pennsylvania* v. *Williams*, 294 U. S. 176, 185; *Meridian* v. *Southern Bell Telephone & Telegraph Co.*, 358 U. S. 639. The district court below, by deciding that no case or controversy existed, did not reach the subsidiary question whether appellants had shown sufficient equity to warrant the exercise of the court's jurisdiction. If it were decided that a case or controversy under Article III is present, the question would be open to the district court whether it should exercise its discretionary powers of equity.

The nub of appellee's argument that the action should be dismissed for lack of equity is simply that appellants are not sufficiently affected by the California avocado maturity law to warrant the interference by a federal court of equity with its enforcement. The evidence presented by appellants' principal corporate officers, which appellee accepted as true for the purpose of the motions to dismiss, show convincingly that the statute under attack has only a slight effect on appellants' business operations. See pages 5 to 7, *supra*. Over 96 percent of all avocados shipped

by appellants to [illegible]ornia complied with the statute and were freely [illegible]keted in California. [Pl. Ex. 17, R. 436, 230; Pl. Ex. 19; R. 438, 247-248; Pl. Ex. 20, R. 438, 283; Pl. Ex. 21, R. 439, 286.] The few lots that failed to comply with the California maturity standards were not lost to appellants. They were transshipped to other western markets outside California at claimed losses which are almost *de minimus* relative to the volume of appellants' business operations. See pages 5 to 7, supra. *Cf., Alabama* v. *Arizona*, 291 U. S. 286, 292.

In the view of appellee, this hardly constitutes the kind of "irreparable injury" both "great and immediate" which should prompt the federal chancellor to interfere with the enforcement of state laws. *Spielman Motors Co.* v. *Dodge*, 295 U. S. 89, 95.

Appellee's position is supported by such Supreme Court cases as *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, and *Douglas* v. *Jeannette*, 319 U. S. 157. The Court in all these cases has recognized the extraordinary nature of a remedy that interferes with the enforcement of state laws by state officials. The policy of caution followed by federal courts in this type of case was stated eloquently by Mr. Justice Cardozo in *Hawks* v. *Hamill*, 288 U. S. 52, 61: "Only a case of manifest oppression will justify a federal court in laying such a check upon administrative officers acting *colore officii* in a conscientious endeavor to fulfill their duty to the state. A prudent self-restraint is called for at such times if state and national functions are to be maintained in stable equilibrium. Reluctance

there has been to use the process of federal courts in restraint of state officials though the rights asserted by the complainants are strictly federal in origin (Cases cited.)"

Mr. Chief Justice Hughes noted that only in "exceptional circumstances" would a federal court exercise its equitable powers against the enforcement of state laws. *Spielman Motor Co.* v. *Dodge*, 295 U. S. 89, 95. Mr. Justice Douglas has observed that it is a "strict test" that must be satisfied. *American Federation of Labor* v. *Watson*, 327 U. S. 582, 593.

The recent case of *Doud* v. *Hodge*, 350 U. S. 485, contains a factual picture that contrasts sharply with the position of appellant corporations. In *Doud* v. *Hodge*, the plaintiff's business consisted exclusively of selling and issuing money orders in the State of Illinois, through such agents as retail drug, hardware and grocery stores. Plaintiff's entire business was regulated and affected by the statute under attack, and plaintiff could not conduct his business operation in any respect without violating the statute.

By contrast, appellant corporations have operated their entire businesses without ever having violated the California statute, the enforcement of which they have asked a federal court to enjoin. The picture presented by appellants, even when stated favorably to them, is as follows: In one of their markets—California—appellants have marketed a substantial volume of one of their products—avocados—but hesitate to increase that volume with fruit from Florida that

may not meet the California avocado maturity law. Instead of showing great and immediate irreparable injury, appellants' case looks to possible future harm. This concern is suggested by appellants' Jurisdictional Statement, in which they anticipate detriment as "avocado trees planted in Florida in recent years come into fruition." (Jurisdictional Statement, p. 15) Neither appellants, nor any other Florida handler, had made any commercial shipments of Florida avocados to California during the period from March 1, 1958, to February 5, 1959.* Affidavit of Whipple, Exhibit "A" to appellee's opposition to appellants' motion to amend complaint. [R. 102.]

It is significant that appellants have never applied for interlocutory relief during the two years that have elapsed since they filed their complaint. This is a further indication that appellants are not suffering the kind of immediate injury which will prompt a federal court to exercise its equitable powers in a suit to enjoin public officers from the enforcement of a state law.

Adequate remedies other than a request for injunctive relief by a federal district court of three judges, with all its burden on the federal judiciary, have been and now are available to appellants. For example, if a justiciable controversy exists, appellants could have sought declaratory relief in the Superior Court of the State of California. *Lord* v. *Garland*,

*Appellants indicate that the reason there have been no avocado shipments to California recently is that the 1957-1958 crop of Florida avocados was disposed of by March 1, 1958, and that the winds and frosts of early 1958 decimated the 1958-1959 crop. Appellants' Answer to Motion to Dismiss or Affirm, fn., p. 5.

27 Cal. 2d 840, 168 P. 2d 5. Under this remedy, appellants are entitled to an expeditious hearing of their case. (California Code of Civil Procedure Sec. 1062a. Indeed, if a case or controversy exists, appellants could seek declaratory relief without an injunction from a single federal district judge under 28 U. S. C. 2201.

Moreover, at any time that appellants were given notice by California law enforcement officers that a given lot of avocados was in noncompliance with the 8 percent oil law, appellants could have taken immediate action to challenge the California law in a concrete factual context. See procedure authorizing court order releasing seized shipments in California Agricultural Code Section 785. By transshipping noncomplying fruit to other western markets, appellants have intentionally avoided a test of the validity of the California avocado maturity statute. Appellants' case simply does not show the existence of equity jurisdiction in the district court.

CONCLUSION

For the reasons stated it is respectfully submitted that this court lacks jurisdiction of the case, and that the appeal must be dismissed. If jurisdiction exists, the judgment of dismissal by the court below is correct and should be affirmed.

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APPENDIX A

California Agricultural Code, Section 784:

"It is unlawful to prepare, pack, place, deliver for shipment, deliver for sale, load, ship, transport, cause to be transported or sell any fruits, nuts, or vegetables in bulk or in any container or subcontainer unless such fruits, nuts and vegetables, and their containers, conform to the provisions of this chapter."

California Agricultural Code, Section 785:

"Any lot of fruits, nuts or vegetables, including the containers thereof, which is not in compliance in all respects with the provisions of this chapter and rules and regulations issued hereunder, is hereby declared to be a public nuisance. Any enforcing officer, if he has reason to believe that any such lot is not in compliance as aforesaid, may hold such lot pending proceedings to condemn and abate such nuisance, as herein provided.

The officer may affix to any lot so held a tag or notice warning that the lot is held and stating the reasons therefor. It is unlawful for any person other than an authorized enforcing officer to detach, alter, deface or destroy any such tag or notice affixed to any such lot, or to remove or dispose of such lot in any manner or under conditions other than as prescribed in such tag or notice, except upon written permission of an authorized enforcing officer or by order of court.

The officer by whom any such lot is held shall cause notice of noncompliance to be served upon the person in possession of said lot. The notice of noncompliance shall include a description of the lot, the place where and the reasons for which it is held, and shall give notice that said lot is a public nuisance and subject to disposal as provided in this section, unless within a specified time said lot shall have been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance.

If the person so served is not the sole owner of the lot, or does not have authority as agent for the owner to bring said lot into compliance, it shall be the duty of such person in writing to notify the officer by whom such lot is held of the names and addresses of the owner or owners and all other persons known to him to claim an interest in said lot. Any person so served shall be liable for any loss sustained by such owner or other person whose name and address he has knowingly concealed from such officer.

If the lot has not been reconditioned or the deficiency otherwise corrected so as to bring said lot into compliance within the time specified in the notice, then the enforcing officer shall cause a copy of said notice to be served upon all persons designated in writing by the person in possession of said lot to be the owner or to claim an interest therein. Any notice required by this section may be served personally or by mail addressed to the person to be served at his last known address.

The enforcing officer, with the written consent of all such persons so served, is hereby authorized to destroy such lot or otherwise to abate the nuisance. If any such person fails or refuses to give such consent, then the enforcing officer shall proceed as provided hereinafter.

If the lot so held is perishable or subject to rapid deterioration, the enforcing officer may file a verified petition in any superior or inferior court of the State to destroy such lot or otherwise abate the nuisance. The petition shall show the condition of the lot, that the lot is situated within the county, that the lot is held, and that notice of noncompliance has been served as herein provided. The court may thereupon order that such lot be forthwith destroyed or the nuisance otherwise abated as set forth in said order.

If the lot so held is not perishable nor subject to rapid deterioration, the enforcing officer shall immediately report the condition of said lot to the director. Within five (5) days from the receipt of such report, the director may file a petition in the superior court in the county where the lot is situated for an order to show cause, returnable in five (5) days, why the lot should not be abated. The owner or person in possession on his own motion within five (5) days from the expiration of the time specified in the notice of noncompliance may file a petition in said court for an order to show cause, returnable in five (5) days, why said lot should not be released to petitioner and any warning tags previously affixed removed therefrom.

Final determination by said court in either case shall be within a period of not to exceed twenty (20) days from the date said petition was filed.

The court may enter judgment ordering that said lot be condemned and destroyed in the manner directed by the court or relabeled, or denatured or otherwise processed, or sold or released upon such conditions as the court in its discretion may impose to insure that the nuisance will be abated. In the event of sale by order of court, the costs of storage, handling and reconditioning or disposal shall be deducted from the proceeds of sale and the balance, if any, paid into court for the owner."

California Agricultural Code, Section 785.6:

"Any person who violates any provision of this chapter shall, in addition to any penalty otherwise provided, be liable civilly, in an action brought by the director, for a penalty in an amount equal to the value which the fruits, nuts, or vegetables involved in the violation would have if they conformed to the requirements of this chapter. The value of such noncomplying fruits, nuts and vegetables shall be the current market value of the lowest priced grade of a marketable commodity of like kind and nature at the time and place of the violation. Any money recovered under this section shall be paid into the Department of Agriculture Fund."

California Agricultural Code, Section 792:

"Avocados shall be free from all defects, including but not restricted to those hereinafter mentioned, which singly or in the aggregate cause a waste of 10 per cent or more by weight, of the entire avocado, including the skin and seed. Not more than 5 per cent, by count, of the avocados in any one container or bulk lot may be below the foregoing requirement.

"'Defect' includes damage due to insect injuries, freezing injury, decay, rancidity, or other causes.

"All avocados, at the time of picking, and at all times thereafter, shall contain not less than 8 per cent of oil, by weight of the avocado excluding the skin and seed."

California Agricultural Code, Section 831:

"The violation of any of the provisions of this chapter is a misdemeanor and punishable by a fine of not less than fifty dollars ($50) nor more than five hundred dollars ($500), or by imprisonment in the county jail for not more than six months, or by both."

California Administrative Code, Title 3, Section 1366.2:

"*Disposition at Inspection Stations of Lots or Loads Which Fail to Comply.*

(a) Produce which fails to comply and which has originated in California may go to a location in California (not out-of-state) under proper written authorization of the enforcement officer, provided it goes

to a specified person or firm at that location, and that legal disposition at destination is performed under the direction of an enforcement officer at destination.

(b) Produce which fails to comply, and which originated outside California, may go to an out-of-state location; (1) if the lot or load returns to an out-of-state destination, or (2) proceeds through California, without unloading, to an out-of state destination; in these two instances reconditioning or remarking is not necessary. However, if such load or lot of produce is to proceed to a California destination, it may do so only under proper written authorization of the California enforcement officer, and provided the destination is a specified person or firm at a California location, and that legal disposition at destination is performed under the direction of an enforcement officer at said destination.

In the case of (2) above of this section, such load or lot may be transported through California only under proper written authorization of the California enforcement officer, and provided an enforcement officer at the border station at the exit location is notified.

(c) A rejected lot or load may be reconditioned or re-marked, whichever is necessary to provide compliance, at the station, provided this is accomplished within a reasonable time specified by the enforcement officer, and when reconditioned, the lot is again submitted for inspection."

California Administrative Code, Title 3, Section 1397.6:

"*Avocados, Sample for Maturity Test.* The number of containers to be selected from any lot of avocados for the purpose of making a maturity test shall be as follows:

Amount	*Sample Containers*
50 containers or less	2
51 to 100	3
101 to 200	4
201 to 300	5
301 to 400	6
401 to 500	7
501 to 800	9
800 and up	10

From each sample container select the least mature appearing avocado, provided the sample for testing shall be at least 5 fruits; if there are less than 5 containers as the number of containers required, more than 1 avocado will need to be selected from some of the containers.

From the sample fruits selected for testing, individually test the 3 least mature appearing avocados. When 2 of these 3 tests are 8 percent oil or better, and 1 of the tests shows less than 8 percent but not below 7.5 percent, 2 additional least mature appearing avocados from the sample shall be tested.

In order to allow for variations incident to the sampling and testing procedure, no lot shall be considered

as failing to meet the maturity requirements when only 1 avocado of the sample tests less than 8 percent oil, provided said low-test fruit does not test below 7.5 percent oil, and the other fruits in the sample each show 8 percent oil or better. (Rev. 5 57)"

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SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1959.

Florida Lime and Avocado Growers, Inc., et al., Appellants, v. Jacobsen, Director of the Department of Agriculture of the State of California, et al.	On Appeal From the United States District Court for the Northern District of California.

[March 7, 1960.]

Mr. Justice Whittaker delivered the opinion of the Court.

Appellants, engaged in the business of growing, packing, and marketing in commerce, Florida avocados, brought this action in the District Court of the United States for the Northern District of California to enjoin respondents, state officers of California, from enforcing § 792 of the California Agricultural Code.[1]

Section 792 prohibits, among other things, the importation or sale in California of avocados containing "less than 8 per cent of oil, by weight of the avocado excluding the skin and the seed." The complaint alleged, *inter alia*, that the varieties of avocados grown in Florida do not normally, or at least not uniformly, contain at maturity as much as 8% of oil by weight; that in each year since 1954 appellants have shipped in interstate commerce, in full compliance with the Federal Agricultural Marketing Agreement Act of 1937[2] and Florida Avocado Order No. 69 issued under that Act by the Secretary of Agriculture on June 11, 1954, Florida avocados into the State

[1] Deering's Agricultural Code of the State of California, 1950, § 2 Div. 5, of West's Ann. California Agricultural Code.

[2] 50 Stat. 246, 7 U. S. C. § 601 *et seq.*

of California and have attempted to sell them there; that appellees, or their agents, have consistently barred the sale of appellants' avocados in California for failure uniformly to contain not less than 8% of oil by weight, resulting in denial to appellants of access to the California market, and forcing reshipment of the avocados to and their sale in other States, to the injury of appellants, all in violation of the Commerce and Equal Protection Clauses of the United States Constitution as well as of the Federal Agricultural Marketing Agreement Act of 1937 and Florida Avocado Order No. 69 issued thereunder.

Inasmuch as the complaint alleged federal unconstitutionality of the California statute, appellants requested the convening of, and there was convened, a three-judge District Court pursuant to 28 U. S. C. § 2281 to hear the case. After hearing, the court concluded that, because appellants had not contested the validity of § 792 but sought abatement of appellees' condemnation of the avocados in the California state courts, the case presented "no more than a mere prospect of interference posed by the bare existence of the law in question," and that it had "no authority to take jurisdiction [and was] left with no recourse other than to dismiss the action," which it did. 169 F. Supp. 774, 776. Appellants brought the case here on direct appeal under 28 U. S. C. § 1253, and we postponed the question of our jurisdiction to the hearing on the merits. 360 U. S. 915.

The first and principal question presented is whether this action is one required by § 2281 to be heard by a District Court of three judges and, hence, whether we have jurisdiction of this direct appeal under § 1253.

Section 2281 provides[1] that an injunction restraining the enforcement of a state statute may not be granted

[1] 28 U. S. C. § 2281 provides:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining

pon the ground of unconstitutionality of such statute
nless the application therefor is heard and determined
' a district court of three judges . . . ." and § 1253 pro-
des ' that any order, granting or denying an injunction
any civil action required by any Act of Congress to be
ard and determined by a District Court of three judges,
ay be appealed directly to this Court.

Appellees concede that if the complaint had attacked
92 *solely* on the ground of conflict with the United
ates Constitution, the action would have been one,
quired by § 2281 to be heard and determined by a Dis-
ct Court of three judges. But appellees contend that
cause the complaint also attacks § 792 on the ground of
nflict with the Federal Agricultural Marketing Agree-
nt Act of 1937 and the Secretary's Florida Avocado
der No. 69, it is possible that the action could be deter-
ned on the statutory rather than the constitutional
ound, and, therefore, the action was not required to be
ard by a District Court of three judges under § 2281
d hence, a direct appeal does not lie to this Court under
253.

Section 2281 seems rather plainly to indicate a con-
ssional intention to require an application for an
unction to be heard and determined by a court of three

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n of any officer of such State in the enforcement or execution
uch statute or of an order made by an administrative board or
mission acting under State statutes, shall not be granted by any
ict court or judge thereof upon the ground of the unconstitution-
of such statute unless the application therefor is heard and
rmined by a district court of three judges under section 2284 of
title."

8 U. S. C. § 1253 provides:

Except as otherwise provided by law, any party may appeal to
Supreme Court from an order granting or denying, after notice
hearing, an interlocutory or permanent injunction in any civil
n, suit or proceeding required by any Act of Congress to be
d and determined by a district court of three judges."

judges in *any* case in which the injunction may be granted on grounds of federal unconstitutionality. The reason for this is quite clear. The impetus behind the first three-judge court statute was the decision in *Ex parte Young*, 209 U. S. 123 (1908), in which it was held that a federal court could enjoin a state officer from enforcing a state statute alleged to be unconstitutional, despite the prohibition of the Eleventh Amendment concerning suits against a State. Debate was immediately launched in the Senate with regard to cushioning the impact of the *Young* case, the principal concern being with the power thus activated in one federal judge to enjoin the operation or enforcement of state legislation on grounds of federal unconstitutionality.[1]

[1] In the Senate debates Senator Overman of North Carolina commented as follows:

"This measure proposes that whenever a petition is presented to a circuit judge before whom it is presented shall, before granting the injunction, call in one circuit judge and one district judge or another circuit court judge, making three judges who shall pass upon the question of the injunction.

"We think, sir, that if this could be done it would relieve intense feeling in the States. As was said by Mr. [illegible] in his dissenting opinion in the Minnesota case (*Ex parte*) we have come to a sad day when one subordinate Federal judge can enjoin the officer of a sovereign State from proceeding to enforce a law of the State passed by the legislature of his own State, practically suspending for a time the laws of the State. That is the cause of the [illegible] being great feeling among the people of the States because of the fact that one Federal judge has tied the hands of a sovereign State and enjoined in this manner the great officer who is charged with the enforcement of the laws of the State, causing almost [illegible] as it did in my State, and in order to allay this feeling [illegible] tute is adopted and three judges have to pass upon the question of the constitutionality of a State statute and three great [illegible] the statute is unconstitutional, the officers of the State will be inclined to resist the orders and decrees of our Federal courts. The people and the courts of the State are more inclined to abide by the decision of three judges than they would of one [illegible]

The result of the debates on this subject was passage of a three-judge court statute in 1910, 36 Stat. 557, which was codified as § 266 of the Judicial Code, 36 Stat. 1162. This statute prohibited the granting of an interlocutory injunction against a state statute upon grounds of federal unconstitutionality unless the application for injunction

[illegible] Federal judge who simply upon petition or upon a hearing [illegible] to the hands of a State officer from proceeding with the enforcement of the laws of his sovereign State. 42 Cong. Rec. 847.

And Senator Bacon of Georgia remarked:

The purpose of the bill is to throw additional safeguards around the exercise of the enormous powers claimed for the subordinate Federal courts. If these courts are to exercise the power of stopping the operation of the laws of a State and of punishing the officers of a State then at least let it be done on notice and not hastily and submit to the judgment of three judges to decide such questions and not permit such dangerous power to one man.

The necessity for this legislation is a very grave one. It is a most serious trouble which now exists that by the action of one judge the machinery of State laws can be arrested. 42 Cong. Rec. 863.

Section 266 of the Judicial Code originally provided in pertinent part:

No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State in the enforcement or execution of such statute, shall be issued or granted by any justice of the Supreme Court, or by any district court of the United States or by any judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court, or a circuit judge and the other two may be other circuit or district judges, and unless a majority of said three judges shall concur in granting such application. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. 36 Stat. 1162.

was heard and determined by a court of three judges. The statute also contained its own provision for direct appeal to this Court from an order granting or denying an interlocutory injunction. The objective of § 266 was clearly articulated by Mr. Chief Justice Taft in *Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Comm'n*, 260 U. S. 212:

> "The legislation was enacted for the manifest purpose of taking away the power of a single United States Judge, whether District Judge, Circuit Judge or Circuit Justice holding a District Court of the United States, to issue an interlocutory injunction against the execution of a state statute by a state officer or of an order of an administrative board of the state pursuant to a state statute, on the ground of the federal unconstitutionality of the statute. Pending the application for an interlocutory injunction, a single judge may grant a restraining order to be in force until the hearing of the application but thereafter, so far as enjoining the state officers, his power is exhausted. The wording of the section leaves no doubt that Congress was by provision *ex industria* seeking to make interference by interlocutory injunction from a federal court with the enforcement of state legislation, regularly enacted and in course of execution, a matter of the adequate hearing and the full deliberation which the presence of three judges, one of whom should be a Circuit Justice or Judge, was likely to secure. It was to prevent the improvident granting of such injunctions by a single judge, and the possible unnecessary conflict between federal and state authority always to be deprecated." 260 U. S., at 216.

In 1925, § 266 was amended to require a three-judge court for issuance of a permanent as well as an interlocutory injunction, and § 238 of the Judicial Code (a broad stat-

governing direct appeals to this Court from District Courts) was amended, so far as here pertinent, to incorporate the provision for direct appeals to this Court from the orders of three-judge courts granting or denying an injunction in a § 266 case. 43 Stat. 938. Such is the present scheme of §§ 2281 and 1253.

With this background, it seems entirely clear that the central concern of Congress in 1910 was to prevent one federal judge from granting an interlocutory injunction against state legislation on grounds of federal unconstitutionality. And the 1925 amendment requiring a court of three judges for issuance of a permanent as well as an interlocutory injunction "was designed to end the anomalous situation in which a single judge might reconsider and decide questions already passed upon by three judges on the application for an interlocutory injunction." *Stratton v. St. Louis Southwestern R. Co.*, 282 U. S. 10, 14. Section 2281, read in the light of this background, seems clearly to require that when, in any action to enjoin enforcement of a state statute, the injunctive decree may issue on the ground of federal unconstitutionality of the state statute, the convening of a three-judge court is necessary; and the joining in the complaint of a nonconstitutional attack along with the constitutional one does not dispense with the necessity to convene such a court. To hold to the contrary would be to permit *one* federal district judge to enjoin enforcement of a state statute on the ground of federal unconstitutionality whenever a nonconstitutional ground of attack was also alleged, and this might well defeat the purpose of § 2281.

Cases in this Court since *Louisville & Nashville R. Co. v. Garrett*, 231 U. S. 298 (1913), have consistently adhered to the view that, in an injunction action challenging a state statute on substantial federal constitutional grounds, a three-judge court is required to be convened and has—just as we have on a direct appeal from its action—jurisdiction over *all* claims raised against the

statute.[7] These cases represent an unmistakable recognition of the congressional policy to provide for a three-judge court whenever a state statute is sought to be enjoined on grounds of federal unconstitutionality, and this consideration must be controlling.

[7] See, e. g., *Van Dyke* v. *Geary*, 244 U. S. 39; *Cavanaugh* v. *Looney*, 248 U. S. 453; *Lemke* v. *Homer-Farmers Elevator Co.*, 258 U. S. 50; *Lemke* No. 1; *Chicago, Great Western R. Co.* v. *Kendall*, 266 U. S. 94; *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189; *Herkness* v. *Lord*, 270 U. S. 92; *Sterling* v. *Constantin*, 287 U. S. 378; *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89; *Railroad Comm'n of California* v. *Pacific Gas & Electric Co.*, 302 U. S. 388; *Public Service Comm'n* v. *Brashear Freight Lines*, 312 U. S. 621; *Phillips* v. *United States*, 312 U. S. 341.

In the *Garrett* case, the following observations were made by Mr. Justice Hughes:

"Because of the Federal questions raised by the bill the Circuit [District] Court had jurisdiction and was authorized to determine all the questions in the case, local as well as Federal. *Siler* v. *Louisville & Nashville R. R.*, 213 U. S. 175, 191. A similar rule must be deemed to govern the application for preliminary injunction under the statute which requires a hearing before three judges, and authorizes an appeal to this court. 36 Stat. 557. This statute applies to cases in which the preliminary injunction is sought in order to restrain the enforcement of a state enactment upon the ground of its unconstitutionality. The reference, undoubtedly, is to an enactment in conflict with the Federal Constitution, and the question of unconstitutionality, in this sense, must be a substantial one. But, when such a question is presented, the application is within the provision, and this being so, it cannot be supposed that it was the intention of Congress to compel the exclusion of other grounds and thus to require a separate motion for preliminary injunction, and a separate hearing and appeal, with respect to the local questions which are involved in the case and would properly be the subject of consideration in determining the propriety of granting an injunction pendente lite. The local questions arising under the state constitution and statutes were therefore before the Circuit [District] Court and the appeal brings them here." 231 U. S., at 303-304.

"In *Sterling* v. *Constantin*, 287 U. S. 378, for example, certain state administrative orders were sought to be enjoined on the ground that they violated both the State and Federal Constitutions. The

Appellees place some reliance on *Ex parte Buder*, 271 U. S. 461, and *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50 (*Lemke I*), in support of their position. *Buder* held merely that a claim of conflict between a state statute and a federal statute was not a constitutional claim requiring the convening of a three-judge court under § 266, and thus there could be no direct appeal here. *Buder* did not, however, require that a constitutional claim be the sole claim before the three-judge court. *Lemke I* held that it was permissible to appeal to the Court of Appeals rather than directly to this Court from the final order of a single district judge in a case in which a state statute was attacked on the grounds that it was both unconstitutional

Governor of the State had declared martial law in an effort to enforce the orders, and his action was also challenged on the ground that the statute purporting to confer such authority on him was in violation of the State and Federal Constitutions. With regard to the jurisdiction of the three-judge court which had been convened for the purpose of considering an application for injunction, Mr. Chief Justice Hughes said:

"As the validity of the provisions of the state constitution and statutes, if they could be deemed to authorize the action of the Governor, was challenged, the application for injunction was properly heard by three judges. *Stratton* v. *St. Louis Southwestern Ry. Co.*, 284 U. S. 530. The jurisdiction of the District Court, so constituted and of this Court upon appeal, extends to every question involved whether of state or federal law, and enables the court to rest its judgment on the decision of such of the questions as in its opinion effectively dispose of the case." 287 U. S., at 303-304.

In *Phillips* v. *United States*, 312 U. S. 246, it was held that a suit by the United States to enjoin the action of a Governor in interfering with the construction of a state power project using federal funds was not within § 266 because the validity of a state statute or order had not been challenged. *Sterling* v. *Constantin* was distinguished on the ground that it involved an attempt to restrain the action of a Governor as part of a main objective to enjoin execution of certain administrative orders as violative of the State and Federal Constitutions. As such, *Sterling* was said to have been "undoubtedly within § 266." 312 U. S., at 253.

and in conflict with a federal statute. The case was decided under § 238, which, until 1925, was a broad statute calling for a direct appeal to this Court from the action of a District Court "in any case that involves the construction or application of the Constitution of the United States . . . and in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States." The breadth of § 238 had led the Court on several occasions to construe this provision to mean that a direct appeal to this Court was required only when the *sole* ground of District Court jurisdiction was the federal constitutional claim involved. *Union Planters' Bank* v. *Memphis*, 189 U. S. 71, 73; *Carolina Glass Co.* v. *South Carolina*, 240 U. S. 305, 318, but if jurisdiction was based both on a constitutional ground and some other federal ground the appeal might properly be taken either to this Court or to the Court of Appeals. *Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 407–408; *McFadden* v. *United States*, 213 U. S. 288, 293. *Lemke I*, decided in 1922, merely followed this line of decisions, and was not in any way concerned with a direct appeal to this Court under § 266 from the order of a three-judge court—the question now before us.

The distinction between the scope of our direct appellate jurisdiction under § 238 and § 266 prior to 1925 was effectively illustrated by the differing course of events in *Lemke I* and *Lemke* v. *Homer Farmers Elevator Co.*, 278 U. S. 65 (*Lemke II*). Both cases involved an attack on a state statute on grounds of federal unconstitutionality and conflict with a federal statute. In both, interlocutory injunctions were sought before three-judge courts, and the injunctions were granted. *Lemke I*, however, also sought a permanent injunction before a single district judge, and, from his order denying the injunction, the case was appealed to the Court of Appeals before coming here. *Lemke II*, on the other hand, was directly

appealed to this Court under § 266 from the interlocutory order of the three-judge court. As indicated, this Court held that the final order of the single judge in *Lemke I* was properly appealed to the Court of Appeals *under* § *238* because of the additional nonconstitutional basis for District Court jurisdiction. But in *Lemke II* this Court took jurisdiction over all issues presented in the direct appeal *under* § *266* from the interlocutory order of the three-judge court. See also *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189, a case virtually identical with *Lemke II*, in which this Court also took jurisdiction over all questions in a § 266 direct appeal from an interlocutory injunction granted by a three-judge court.

The problem was greatly simplified in 1925 when § 266 was amended to require three-judge courts for the granting of both interlocutory and permanent injunctions on grounds of federal unconstitutionality, and § 238, while substantially amended to reduce the scope of our general appellate jurisdiction, so far as here pertinent, merely incorporated the provision for direct appeals to this Court from injunctions granted or denied under § 266. We do not find in these amendments any intention to curtail either the jurisdiction of three-judge courts or our jurisdiction on direct appeal from their orders. Indeed, the cases since 1925 have continued to maintain the view that if the constitutional claim against the state statute is substantial, a three-judge court is required to be convened and has jurisdiction, as do we on direct appeal, over *all* grounds of attack against the statute. *E. g., Sterling* v. *Constantin*, 287 U. S. 378, 393-394; *Railroad Comm'n of California* v. *Pacific Gas & Electric Co.*, 302 U. S. 388, 391; *Public Service Comm'n* v. *Brashear Freight Lines*, 312 U. S. 621, 625, n. 5.

To hold that only one judge may hear and decide an action to enjoin the enforcement of a state statute on both constitutional and nonconstitutional grounds would be

to ignore the explicit language and manifest purpose of § 2281, which is to provide for a three-judge court whenever an injunction sought against a state statute may be granted on federal constitutional grounds. Where a complaint seeks to enjoin a state statute on substantial grounds of federal unconstitutionality, then even though nonconstitutional grounds of attack are also alleged we think the case is one that is "*required* by . . . Act of Congress to be heard and determined by a district court of *three* judges." 28 U. S. C. § 1253. (Emphasis added.) We, therefore, hold that we have jurisdiction of this direct appeal.

We turn now to the merits. The Court is of the view that the District Court was in error in holding that because appellants had not contested the validity of § 792 nor sought abatement of appellees' condemnation of their avocados, there was no "existing dispute as to present legal rights," but only "a mere prospect of interference posed by the bare existence of the law in question [§ 792]," and in accordingly dismissing the action for want of jurisdiction. As earlier stated, the complaint alleges that, since the issuance of the Secretary's Florida Avocado Order No. 69 in 1954, appellants have made more than a score of shipments in interstate commerce of Florida avocados to and for sale in California, and appellees, or their agents, have in effect consistently condemned those avocados for failure to contain 8% of more of oil by weight, thus requiring appellants—to prevent destruction and complete loss of their shipments—to reship the avocados to and sell them in other States, all in violation of the Commerce and Equal Protection Clauses of the United States Constitution as well as the Marketing Agreement Act of 1937. It is therefore evident that there is an existing dispute between the parties as to present legal rights amounting to a justiciable controversy which appellants are entitled to have determined on the

merits. In these circumstances, the fact that appellants did not contest the validity of § 792 nor seek abatement of appellees' condemnation of the avocados in the California state courts—which, because of the time period necessarily involved would have resulted in the complete spoilage and loss of the product—does not constitute an impediment to their right to seek an injunction in the federal court against enforcement of § 792 on the ground that it violates both the Constitution of the United States and the Federal Agricultural Marketing Agreement Act of 1937.

The judgment is therefore reversed and the cause is remanded to the District Court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE DOUGLAS joins in the part of the opinion that passes on the merits, the Court having held, contrary to his view, that the case is properly here on direct appeal from a three-judge court.

SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1959.

Florida Lime and Avocado Growers, Inc., et al., Appellants. v. Jacobsen, Director of the Department of Agriculture of the State of California, et al.	On Appeal From the United States District Court for the Northern District of California.

[March 7, 1960.]

Mr. Justice Frankfurter, whom Mr. Justice Douglas joins, dissenting.

The statute providing for three-judge Federal District Courts, with direct appeal to this Court, in cases seeking interlocutory injunctions of the operation of state statutes on constitutional grounds was enacted in 1910. 36 Stat. 557. It was amended in 1925 to apply to applications for final as well as interlocutory injunctive relief. 43 Stat. 938. Since that time this Court has taken jurisdiction by way of direct appeal in several cases like the present one where a state statute was sought to be enjoined both on federal constitutional and non-constitutional grounds. See *Hodges* v. *Iron*, 278 U. S. 92; *Sterling* v. *Constantin*, 287 U. S. 378, 393 (limited in *Phillips* v. *United States*, 312 U. S. 246); *Spielman Motor Sales Co.* v. *Dodge*, 295 U. S. 89; *Parker* v. *Brown*, 317 U. S. 341.[1] In none of these cases, however, was our jurisdiction challenged by

[1] Prior to the 1925 extension of this three-judge court statute to applications for final injunctions, there were also cases like the present one where non-constitutional as well as constitutional questions were made, in which the Court accepted jurisdiction. See *Louisville & Nashville R. Co.* v. *Garrett*, 231 U. S. 298; *Lemke* v. *Farmers Grain Elevator Co.*, 258 U. S. 50; *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50; *Shawnee Compress Co.* v. *Anderson*, 209 U. S. 423, 433. In none of these cases, however, except *Louisville & Nashville R. Co.* v. *Garrett*, was

the litigants because non-constitutional as well as constitutional relief was sought, or did the Court notice the existence of a question as to our jurisdiction on that score. We should therefore feel free to apply Mr. Chief Justice Marshall's approach in a similar situation to unconsidered assumptions of jurisdiction: "No question was made, in that case, as to the jurisdiction. It passed *sub silentio*, and the court does not consider itself as bound by that case." *United States* v. *More*, 3 Cranch 159, 172. See also Mr. Chief Justice Marshall in *Durousseau* v. *United States*, 6 Cranch 307, and Mr. Justice Brandeis dissenting in *King Mfg. Co.* v. *Augusta*, 277 U. S. 100, 135, n. 21: "It is well settled that the exercise of jurisdiction under such circumstances [where counsel did not question our jurisdiction] is not to be deemed a precedent when the question is finally brought before us for deter-

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any attention whatsoever to jurisdictional considerations, and in the case there was no direct challenge to this Court's jurisdiction of the whole case under the three-judge statute on the ground that both constitutional as well as constitutional claims were made. But there is an even more fundamental reason for discounting these pre-1925 cases as authority regarding the jurisdictional problem in the present case. As *Garrett* and these other cases were decided prior to the 1925 Jurisdictional Act, which drastically shrunk this Court's jurisdiction on appeal, they arose at a time when the scope of direct appellate jurisdiction here over decisions of ordinary one-judge District Courts was much broader than it now is, and in fact applied to all cases of the Judicial Code to all constitutional cases, including cases like the present one involving federal statutory grounds for relief in addition to constitutional grounds." *See Spreckels Sugar Refining Co.* v. *McClain*, 192 U. S. 397, 407–408; *Machadden* v. *United States*, 1 U. S. 288. Thus the results in these pre-1925 cases, permitting the same scope of direct appeal to this Court in three-judge cases as was then permitted in one-judge cases, were not as obviously out of harmony with the scheme of the federal judicial system in their day as I believe the decision is which the Court makes today.

mination." [1] I therefore approach the question of our jurisdiction in the present case as open, calling for a thorough canvass of the relevant jurisdictional factors. The Court does not undertake such a canvass, but relies instead upon the cases cited and upon what it deems explicit statutory language and plainly manifested congressional intent. Consideration of what are to me the relevant factors leads me to dissent from the Court's conclusion that we have direct appellate jurisdiction in this case.

Appellants' complaint seeks injunction of the operation of § 792 of the California Agricultural Code on the grounds that it is in conflict with the Federal Agricultural Marketing Agreement Act of 1937, 7 U. S. C. § 601 *et seq.*, and the Commerce and Equal Protection Clauses of the United States Constitution. The complaint requested the convening of a three-judge District Court to adjudicate these claims. A three-judge court was convened and, after hearing, it entered a judgment dismissing the action on the ground that no justiciable controversy existed. 169 F. Supp. 774. A direct appeal was taken to this Court pursuant to 28 U. S. C. § 1253. The Court now holds that three judges were required to adjudicate appellants' claims below and that we therefore have jurisdiction to decide this appeal on its merits.

The statute governing our direct appellate jurisdiction from decisions of three-judge District Courts is 28 U. S. C. § 1253:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order

[1] The Court's Rules 15 (e) (1) and 23 (e) emphasize the doctrine that a *sub silentio* exercise of jurisdiction is not controlling as precedent. Only the questions set forth in the jurisdictional statement or petition, or fairly comprised therein will be considered by the Court.

granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Whether the present case was a "proceeding required to be heard and determined by a district court of three judges," and therefore within our direct appellate jurisdiction, depends upon the meaning to be given to 28 U. S. C. § 2281:

> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title."

I start with the proposition, as I understand the Court to do, that whether a case is one directly appealable here under 28 U. S. C. § 1253 depends upon the complaint and not upon the result in the District Court. If three judges are required to hear the claims which are made then we have direct appellate jurisdiction to review their decision even though it be on non-constitutional grounds. If three judges are not required in view of the complaint and the case is determinable by a single judge, we have no jurisdiction by way of direct appeal under § 1253 even though the decision be a constitutional one.

In this case the complaint did not attack the Florida statute solely on the ground of its conflict with the Commerce and Equal Protection Clauses of the Constitution.

t also attacked it because of its asserted conflict with
he Federal Agricultural Marketing Agreement Act of
937, a claim which in the first instance requires con-
truction of both the Federal Act and the California
tatute and which for purposes relevant to our issue is
ot a constitutional claim. *Ex parte Buder*, 271 U. S.
61. The question thus presented is whether three judges
re to be required, with a consequent direct appeal to
his Court, merely because a constitutional claim is made
although it is joined with claims that may dispose of the
ase on essentially statutory and perchance local statu-
ory grounds. The Court decides that three judges are
equired in such a case. I would hold that there are
equired to be three judges and a direct appeal to this
ourt only when the exclusive ground of attack upon a
tate statute is direct and immediate collision with the
onstitution, thus seeking a constitutional decision in
rder that relief be granted.

Neither my position nor the Court's is entirely satisfac-
ory. My view would leave it open for a single district
dge to enjoin a state statute on the ground of its uncon-
titutionality if the complaint also contains non-constitu-
ional grounds for relief. As the Court points out, such
result would conflict with the superficial literal sense
f 28 U. S. C. § 2281 that an "injunction restraining the
nforcement . . of any State statute . . . shall not be
ranted by any district court . . . upon the ground of the
nconstitutionality of such statute unless the application
herefor is heard and determined by a district court of
hree judges . . . ." The effect of the Court's decision,
n the other hand, is to require the convening of a three-
dge court, with the concollary right of direct appeal of its
ecision to this Court, in cases where, as a consequence of
he presence of a substantial non-constitutional ground for
elief, the constitutionality of a state statute will play no
art in the decision either in the District Court or in this

Court. There can be expected to be many such cases. For an example of one of them see *Herkness* v. *Deer*, 278 U. S. 92. It can fairly be stated, and with this I understand the Court fully to agree, that in devising the three-judge District Court scheme relating to state legislation Congress was concerned with providing appropriate safeguards against the invalidation of state legislation on constitutional grounds. I am therefore put to a choice between holding this three-judge procedure applicable to a large class of non-constitutional cases, where the unusual demands which that procedure makes upon the federal judicial system were never thought justifiable by Congress, and departing from the strictly literal scope of § 2281 in order to restrict the scope of this three-judge procedure with a view to preventing its operation outside of its proper constitutional sphere. I am led to choose the latter by considerations which are to me controlling, namely, considerations bearing on the efficient operation of the federal judicial system. For I do not feel myself compelled to disregard these considerations either by inelastic statutory language or by any unambiguous evidence of congressional purpose to the contrary.

What jurisdictional result in a case like this is most likely to comport best with the operation of the federal judicial system is to be determined with regard to two general and conflicting considerations, both of which are directly relevant to a construction of the provisions respecting three-judge District Courts in the context of the present situation. On the one hand is the policy which gave rise to the creation of the three-judge requirement in these cases, protection against the improvident invalidation of state regulatory legislation was sought to be achieved by resting the fate of such legislation in the first instance in the hands of three judges, one of whom must be a circuit judge (or, originally, a Justice of this Court), rather than in a single district judge.

See Pogue, State Determination of State Law, 41 Harv. L. Rev. 623; Hutcheson, A Case for Three Judges, 47 Harv. L. Rev. 795. And direct appeal to this Court was provided, instead of the usual route from District Court to Court of Appeals, not only to avoid the incongruity of three judges reviewing three judges, but also to hasten ultimate determination of the validity of the legislation and to avoid the delay and waste of time during which the operation of legislation eventually held to be valid might be restrained on constitutional grounds by injunction.

Were only these considerations claiming judgment in construing inert language it would plainly follow, as the Court has concluded, that three judges are required to hear the complaint in this case, for constitutional claims are made and it is not precluded that injunctive relief may be granted on an obvious conflict with specific constitutional provisions. But so to rule here is in my view to fail to give due regard to countervailing considerations of far-reaching consequences to the federal judicial system, affecting the functioning of district and circuit judges as well as of this Court. Specifically, the convening of a three-judge trial court makes for dislocation of the normal structure and functioning of the lower federal courts, particularly in the vast non-metropolitan regions; and direct review of District Court judgments by this Court not only expands this Court's obligatory jurisdiction but contradicts the dominant principle of having this Court review decisions only after they have gone through two judicial sieves, or, in the case of federal regulatory legislation, through the administrative tribunal and a Court of Appeals. Also, where issues of local law have to be adjudicated before reaching questions under the United States Constitution, the desirability of having the appropriate Court of Appeals adjudicate such local issues becomes operative.

I deem regard for these demands which the three-judge requirement makes upon the federal judiciary to be the jurisdictional consideration of principal importance in a case such as this where a claim is seriously urged which necessarily involves, certainly in the first instance, construction of local or federal statutes, thus making potentially available a non-constitutional ground on which the case may be disposed of. It is more important that the ordinary operation of our judicial system not be needlessly disrupted by such a case than it is to insure that every case which may turn out to be constitutional is heard by three judges. I am led therefore to construe strictly the statutes providing the three-judge procedure relevant to this case so as to permit their invocation only when the claim is solely constitutional, thus tending to insure that the three-judge procedure will not be extended to non-constitutional cases not within its proper sphere.

My adherence to such confining construction of the necessity both for convening three judges and for this Court to be the first appellate tribunal is consistent with the approach this Court has taken when it has in the past refused to apply this legislation. See *Moore* v. *Fidelity & Deposit Co.*, 272 U. S. 317; *Smith* v. *Wilson*, 273 U. S. 388; *Ex parte Collins*, 277 U. S. 565; *Oklahoma Gas Co.* v. *Packing Co.*, 292 U. S. 386; *Ex parte Williams*, 277 U. S. 267; *Ex parte Public National Bank*, 278 U. S. 101; *Rorick* v. *Board of Commissioners*, 307 U. S. 208; *Ex parte Bransford*, 310 U. S. 354; *Wilentz* v. *Socony-Vacuum Oil Co.*, 306 U. S. 573; *Phillips* v. *United States*, 312 U. S. 246; *Stainback* v. *Mo Hock Ke Lok Po*, 336 U. S. 368. As we stressed in *Phillips* v. *United States*, *supra*, these cases approach this three-judge statute as a procedural technicality and not as the embodiment of a more or less broadly phrased social policy the enforcement of which requires a generous regard for some underlying social purpose. In *Stainback* v. *Mo Hock Ke Lok Po*, *supra*, we

continued to refer to "the long-established rule of strict construction" of this provision for three judges, 336 U. S., at 378, and refused to find it applicable to the Territory of Hawaii. These cases recognize what the Court today in my view does not—that in giving scope to the three-judge requirement due regard should be given to the consequences to the effective functioning of the federal judiciary as a totality, especially to the fact that an expansive construction of the three-judge requirement increases the scope of this Court's direct review and thereby is at cross purposes with the Act of February 13, 1925, 43 Stat. 936, the primary aim of which was to keep our appellate docket within narrow confines. *See Moore v. Fidelity & Deposit Co.*, 272 U. S. 317, 321.

As against the result to which I am led by these important considerations bearing on the proper functioning of the federal judicial system, which I do not understand the Court to dispute, I cannot be persuaded, as apparently the Court is, by arguments stemming from "the explicit language," the literal sense, of 28 U. S. C. § 2281. Jurisdictional provisions are not to be read in isolation with mutilating literalness, but as harmonizing parts of the comprehensive, reticulated judicial system. For an instance of this Court's express refusal to give the surface literal meaning to a jurisdictional provision on the ground that to do so would not be consistent with the "sense of the thing" and would confer upon this Court a jurisdiction beyond what "naturally and properly belongs to it," see *American Security & Trust Co. v. Commissioners*, 224 U. S. 491, 495. And see *Ex parte Collins*, 277 U. S. 565, 568, where "[d]espite the generality of the language" of this three-judge provision, it was held that a suit was not one to restrain the operation of a state statute when "the defendants are local officers and the suit involves matters of interest only to the particular municipality or district involved." Reliance upon literalism in construing a juris-

dictional statute constitutes slavish adherence to words as though they were symbols having single, absolute meanings, and reflects indifference to the significance of jurisdictional legislation as a vehicle for judicial administration.

Nor am I persuaded that I must decide contrary to what are to me the considerations of proper judicial administration by what seems chiefly to have persuaded the Court, namely, that § 2281 "plainly . . . indicate[s] a congressional intention to require an application for an injunction to be heard and determined by a court of three judges in *any* case in which the injunction may be granted on grounds of federal unconstitutionality." (Pp. 3-4 of the Court's opinion.) I can find no such plain congressional intention with regard to the problem presented by the present case. When the three-judge statute was first passed by Congress in 1910 it applied only to applications for interlocutory injunctions. Jurisdiction remained in a single judge to hear an application for a final injunction against the operation of a state statute on grounds of unconstitutionality, and a single judge had the power to grant such an injunction. Thus it is impossible to attribute to Congress at that time an intention that *any* case involving an injunction of a state statute on constitutional grounds be heard and determined by three judges. The concern was only with improvident interlocutory relief. And in 1925, when the three-judge statute was extended to include applications for final as well as interlocutory relief, the only evident concern of Congress was, as the Court agrees, "to end the anomalous situation in which a single judge might reconsider and decide questions already passed upon by three judges on the application for an interlocutory injunction." *Stratton v. St. Louis Southwestern R. Co.*, 282 U. S. 10, 14. It is, of course, common knowledge that Congress' central concern in enacting the Jurisdictional Act of 1925 was to restrict the obligatory appellate jurisdiction of this Court. This

although the result of the 1910 and 1925 Acts is language which on its face appears to prohibit one judge from ever enjoining a state statute on constitutional grounds. I do not think it fair to say that there was ever a deliberate accompanying purpose in Congress to achieve such a sweeping inflexible result. In the absence of any manifestations of such a purpose, I do not see why we should attribute to Congress, as the Court does, an intention to achieve a result which to me is plainly out of harmony with the best operation of the federal judicial system.

And if we are to look to our prior decisions for guidance with regard to the proper approach to statutes conferring upon this Court direct appellate jurisdiction over decisions in constitutional cases, I find much more relevant than the decisions relied upon by the Court, which reached the Court's result without consideration of the jurisdictional problems now presented, our decisions in *Ex parte Buder*, 271 U. S. 461, and in *Lemke v. Farmers Grain Co.*, 258 U. S. 50 (*Lemke I*). *Buder* arose under the three-judge statute involved in the present case and *Lemke I* arose under § 238 of the old Judicial Code which, no less literally than the statute in the present case, gave this Court direct appellate jurisdiction in cases in which a state law was "claimed to be in contravention of the Constitution of the United States." In both of these cases the jurisdictional problem was expressly considered, and the jurisdictional legislation was read so as not to require this Court's direct appellate jurisdiction in cases where non-constitutional claims were made, even though

It is interesting to note that while the Judicial Code also contains a provision requiring three judges to hear cases seeking injunctions of federal statutes on constitutional grounds (28 U. S. C. § 2282), Congress has left no room for doubt that in litigation attacking federal statutes if in fact (where the United States or one of its agents is a party) a federal statute is declared unconstitutional the case is to be directly reviewed here. 28 U. S. C. § 1252 so provides.

constitutional factors were also implicated and decision might ultimately have turned on constitutional grounds.

Legislating is for Congress. Applying what Congress has enacted requires oftener than not construction. That is a judicial function. This is particularly true of judiciary legislation which is mainly concerned with the distribution of judicial power through deployment of the judicial force and the effective exercise of appellate review. It is also true to state that Congress seldom concerns itself with this Court's decisions construing judiciary legislation unless some dramatic result arouses its interest. We do not have to go further for an illustration of this generalization than to notice the indifference of Congress, in the sense that no legislative changes have been proposed one way or the other, with regard to the Act involved in this case, or the Criminal Appeals Act of 1907. Because these things are true I am convinced that it would in no wise show a disregard for any legislative purpose in the enactment of the three-judge device, or for any kind of legislative attitude toward the series of cases in which this Court has since then applied that legislation, if now upon full consideration we were to construe this legislation in light of the demands of the federal system as a totality to restrict it to what was plainly the central concern of Congress, to wit, to those cases where state legislation is challenged *simpliciter* as directly offensive to some specific provision of the Constitution and where the claim is not entangled with other claims, usually turning upon the construction of local or federal statutes, which necessarily must be passed upon before the constitutional question is reached. I therefore dissent from the decision of the Court that we have jurisdiction in this case.